

GRADE: A-

QUESTION

In *Lamb v Camden LBC* [1981] 1 QB 625 at 636, Lord Denning observed:

“The truth is that all these three – duty, remoteness and causation – are devices by which the courts limit the range of liability for negligence ... All these devices are useful in their way. But ultimately it is a question of policy for the judges to decide.”

Critically evaluate this statement, using examples from the negligence cases we have studied to illustrate your answer.

A. INTRODUCTION

In theory, the legal requirements in establishing an action in the tort of negligence are duty, breach, causation, and remoteness. In reality, however, policy considerations often play a more significant role in a judgement. This is highlighted in Lord Denning's dicta in *Lamb v Camden* where he suggested that whether a person is liable for negligence is, in truth, "a question of policy for the judges to decide", bringing up the tension between legal principles and policy considerations in determining the outcome of a case and whether the law should be objectively or subjectively ascertained. One also notes the distinction that legal principles promote certainty while policy advocates justice. In evaluating this issue, it is conclusive (**This is a very absolute stand to take; you will need to justify it.**) that recourse to policy, either explicitly or through legal principles, is the favoured judicial approach, especially in the modern era. **Good intro.**

B1. POLICY CONSIDERATIONS

The issue is whether policy considerations ultimately decide judgements in cases involving the tort of negligence, thus superseding legal principles. **Good.**

In **duty of care**, *Donoghue v Stevenson* illustrated how the court used policy to establish a duty of care from the manufacturer to the consumers of their product. This is a clear case of using policy to defeat past laws because, prior to that, there would be no duty of care unless a contractual relationship existed. Likewise in *Caparo Industries PLC v Dickman*, the court held that it was not "just and reasonable" to impose duty on the defendants, coming up with a three-part test to determine future negligent cases where policy plays an intrinsic role.

Under duty of care, special scenarios further highlight the critical role policy plays. In pure economic losses, Lord Denning in *Spartan Steel v Martin & Co.* decided the case solely on policy, stating policy considerations such as position of statutory undertakers and the 'floodgates' argument. Elsewhere in wrongful birth and wrongful life claims, the courts in *McFarlane v Tayside Health Board* ("*McFarlane*") and *McKay v Essex*, respectively, gave reasons for non-recovery based on policy, i.e. reluctance to treat children as financial liability and violation of sanctity of life.

In **causation**, the courts in *Fairchild v Glenhaven Funeral Services* decided that the injustice involved in not allowing the plaintiff to be compensated far outweighed any injustice to the employers and used policy to extend liability to defendant despite plaintiff failing the 'but for' test of factual causation. Similarly in *Chester v Afshar*, the courts, in trying to achieve corrective justice, modified the traditional

causation principles to vindicate patient's right to an informed choice and awarded damages to plaintiff despite her failing the 'but for' test. In both cases, it was held that duty would be hollow if the plaintiff were not awarded damages, a clear display of policy trumping legal principles.

Furthermore, legal causation is established to prevent indeterminate liability resulting from factual causation alone, and this involves policy considerations. The concept used in causation in law is that of *novus actus interveniens*, i.e. a new intervening act that takes place between the defendant's negligent conduct and the damage. This can be seen in *Lamb v Camden* where the courts held that as a matter of policy, the plaintiff's action should fail as it was her responsibility to keep squatters out of her own property or insure against theft, not the council's.

In **remoteness**, the standard test laid down by *Re Polemis* was replaced by a new one in *The Wagon Mound* because the court felt that it was inconsistent with notions of justice that a person can be held liable for all damages because of his negligence as long as damage is a direct result and that people should only be responsible for probable consequences of their actions.

As a matter of policy, the law prevents recovery in wrong kinds of losses. Claims for losses such as knowledge of impending death (*Hicks v Chief Constable of South Yorkshire*), wrongful birth (*McFarlane*), and cost of artificial means of replacing a dead loved one (*Man Mohan Singh v Zurich Insurance*) will fail.

B2. LEGAL PRINCIPLES

On the other hand, there are instances where legal principles are used ultimately to decide a case and where policy considerations are absent or not explicitly employed. **How do you reconcile this with your very absolute claim in the 1st place?**

In **duty of care**, Lord Atkin's test of foreseeability in *Donoghue v Stevenson*, used to establish negligence, is *prima facie* based on legal principles and absent of policy concerns. While the test was born of policy concerns, it is, on its own, an objective and reasonable test. Furthermore, in Lord Wilberforce's two-stage test in *Anns v Merton London Borough Council* ("*Anns*"), although the second stage appears to be policy-based, the courts at that time did not overtly articulate policy and it went underused. Thus, most cases on negligence then were decided at the first stage of proximity, a legal principle.

Furthermore, in cases of economic losses arising from negligent misstatements, the *Hedley Byrne* principle, which is based on voluntary assumption of responsibility, appears to be a separate approach in determining duty of care in England. Lord Goff in *Henderson v Merrett Syndicates* even stated that "once the case is identified as falling within the *Hedley Byrne* principle, there should be no need to embark upon any further enquiry whether it is 'fair, just and reasonable' to impose liability for economic loss".

However, this does not take into account precedents in which a duty of care was established even where there was no assumption of responsibility and reliance by the defendant towards plaintiff i.e. *White v Jones*. Additionally, the relevant test in determining duty in Singapore is the *Spandeck* test where the *Hedley Byrne* principle would be subsumed under the first limb of proximity. Since the second limb is policy considerations, it would mean that ultimately the case is still subjectively determined by policy.

In **causation**, the 'but for' test is used and it is also **seemingly** absent of policy. In *Barnett v Chelsea*, the courts held that but for the doctor's refusal of treatment, the plaintiff's husband would still have died, thus the defendants were not liable, a clear and straightforward application of the test.

However, the 'but for' test is overly-inclusive and overly-exclusive at times, and solely relying on it may lead to absurd results i.e. *Cook v Lewis*, where but for either hunter's shooting, the plaintiff would still have been injured, leaving him without remedy. In the end, the modification of the 'but for' test to achieve justice was still required, as in *Bonnington Castings v Wardlaw* (material contribution to injury test) and *McGhee v National Coal Board* (material increase in risk test).

C. CONCLUSION

Lord Denning's statement does seem to be reflective of modern judiciary mindsets in that judges are increasingly shifting towards judgements that reflect the spirit of the law as opposed to the letter of the law. This is done either legally through 'backward reasoning' or modifying present laws, or through policy. That the goal of achieving fairness and justice is becoming more prevalent may be an acknowledgement of contemporary society's emphasis on these values. In conclusion, in cases of negligence, it is ultimately policy which decides the law.

(Word Count: 1180)

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COMMENTS

Nicholas – Good essay; the only hiccup came around mid of 2nd page – you say legal principles are relevant but that contradicts the earlier 100% view that everything is 'ultimately' dealt with by policy. How do you reconcile this? You tried to, but I think you probably need a bit more space. Apart from that, a good effort.